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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO,
A COLORADO CORPORATION, and
BISHOP WILLIAM FREY,
Petitioners,

v.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF PASTORAL COUNSELORS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae American Association of Pastoral Counselors ("AAPC"), a nonsectarian nonprofit Missouri corporation founded in 1963 with its principal office in Fairfax, Virginia, has sought the consent of the parties to participate in this matter by the filing of the enclosed brief. The petitioners' consent letter to file this brief is on file with the Clerk in accordance with Rule 37.3, but respondents have withheld their consent, necessitating this motion. This motion and the enclosed brief are filed in support of the petitioners not only to bring relevant matter to the attention of the Court not otherwise available through the parties as required by Rule 37.1, but to emphasize to the Court the national significance to pastoral counselors of the issues presented by this case.

This Colorado case raises First Amendment issues of national significance. It was wrongly decided, reaffirm-

ing the Colorado Supreme Court's earlier adoption of an unfortunate breach of trust theory for clergy. *See Destafano v. Grabian,* 763 P.2d 275 (Colo. 1988). It seems that Colorado has found a way to compensate people for the loss of their "trust in God and the church." It is one thing for clergy counselors to be held personally liable for injuries of counselees resulting from sexual misconduct with the counselor, and quite another to reach ecclesiastical authorities with liability for aggravation of the loss of trust in God and the church as a result of sincere religious counseling and direction requested by the counselee. Nothing could be farther from this Court's First Amendment religion clause cases, new federal law, and other state court decisions. The lower court's decision, if left to stand, will adversely impact the public interest in and access to pastoral counseling. It thus merits plenary review by this Court.

The case has raised concerns for pastoral counseling supervisors throughout the country. The lower court did not understand that pastoral counseling supervision, like diocesan supervision of parish clergy, is not equivalent in concept or practice to employment supervision. The court did not understand that "negligent supervision" as a legal conclusion rests on facts that would be expected in an employment situation, evidencing real control by the supervisor over the subordinate. Such facts are not present here and are not usually present in pastoral counseling supervision. The threat of such liability assigned to pastoral counseling supervision or diocesan supervision without the effective means to control the supervisee will have severe adverse consequences for the practice of pastoral supervision.

Supervisors in pastoral counseling centers accept the educator-mentor model, but do not, outside the administrative context, undertake detailed quality assurance monitoring of a supervisee's counseling caseload, as might be expected in an employment context. The goal of the

supervision is to enhance the professional performance of the supervisee, to evaluate the issues and problems the supervisee identifies. They will work to improve the insight of the counselor in being a representative of a faith community to the counselee and in doing the work of pastoral counseling. They have no foreknowledge of human failure and, thus, cannot predict it in their supervisees. When factors indicate, supervisors will intervene or monitor actual cases. However, they will stop supervising if they must become, as a matter of law, insurers of the supervisee's professionalism, guarantors that the supervisee will not commit a boundary violation or mishandle the transference or countertransference phenomenon.

If they use influence, but have little control in an employment-like setting over their supervisees, supervisors cannot be held to negligence standards for "hiring" their supervisees. The Colorado decision seems to imply otherwise—that testing will be a reliable predictive indicator of a supervisee's competency to handle the transference phenomenon. Common sense says otherwise. The prediction of who will be attracted to whom or for what reason is not a science.

The lower court's decision invites the conclusion that the courts would have pastoral counseling supervisors become insurers of their supervisees' misconduct when it later appears that they "should have known" not to let the supervisee continue counseling. The court takes the psychological test as predictive evidence of future misconduct. Yet, if this were true, many counselors today would be forced to abandon their profession. It is virtually impossible to predict which supervisees, if any, will violate ethical boundaries. To require such prediction, or the use of a screening test, will reduce the supervisors available to aid pastoral counselors seeking professional certification. For these reasons, the Colorado case endangers pastoral counseling supervision programs not only in Colorado, but throughout the country. Without su-

pervision, the quality assurance now represented by certification standards for pastoral counselors will not be maintained and the level of competent care now available to the public will be reduced.

If the Colorado decision stands, AAPC must decide whether and how to incorporate Colorado's rules into new practice standards, whether to revise its procedures for all supervisors, or whether to create exceptions for Colorado residents supervising uncertified members.

For the reasons stated in this Motion for Leave to File a Brief *Amicus Curiae*, amicus respectfully urges this Court to grant its motion and to grant the petition for certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether Colorado's imposition of tort liability upon an Episcopal bishop, for breach of a fiduciary duty when providing ministry to a church member in the course of his diocesan work, burdens his free exercise of religion in violation of the First Amendment, the Religious Freedom Restoration Act, and *Employment Division v. Smith*, 494 U.S. 872 (1990).

Whether Colorado, in finding negligence liability against an Episcopal diocese based on duties arising under legal relationships foreign to Episcopal Church polity and practice, infringed the diocese's First Amendment rights, namely, its free exercise of religion, and impermissibly encroached upon church autonomy in contravention of the Establishment Clause.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF PASTORAL COUNSELORS IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae American Association of Pastoral Counselors ("AAPC") is a membership organization that certifies individuals and accredits institutions for the practice and teaching of pastoral counseling. Generally, pastoral counselors seek to integrate insights of pastoral theology with the behavioral sciences in the treatment and care of persons with spiritual and emotional needs. AAPC supports the development of pastoral counseling as a professional vocation and specialized ministry within the mental health care field. Pastoral counselors or

pastoral psychotherapists usually see clients in clinical or professional office settings. They are compensated by clients according to fee agreements, encouraged to maintain clinical records, and make appropriate referrals to physicians and psychiatrists or other mental health care providers. Pastoral counselors may, depending on their ecclesiastical tradition, hear confessions and/or grant absolution, but all will communicate pastorally, providing spiritual counsel respectful of and responsive to the counselee's religious understanding.

AAPC's professional staff, including Executive Director, Rev. C. Roy Woodruff, Ph.D., Deputy Executive Director, Rev. Reginald Burgess, Ph.D., and its officers, including President, Rev. Jean Dalby Clift, Ph.D., J.D., of Denver, Colorado, assist in developing AAPC regional and national educational and training conferences. They coordinate activities of volunteer committees that oversee the certification process and monitor quality assurance of ethical concerns for approximately 3,000 members throughout the United States and Canada. Membership categories indicate the degree of specialized professional training, supervision obligations and privileges, and clinical practice competency: Diplomate (certified), Fellow (certified), member associate, pastoral affiliate, and pastoral counselor in training. All members are ordained (or have its equivalency) and endorsed by their faith group for the ministry of pastoral counseling. The faith groups include Roman Catholic, Orthodox, Protestant, and Jewish. Members provide millions of hours of empathetic counsel to distressed people each year in parish, synagogue and clinical settings, thereby supporting other clergy with limited time or resources to devote to those in need of counseling ministry.

AAPC's certification of individuals and accreditation of institutions assures the public that the pastoral counselor member has met prerequisite competency standards through education and training. AAPC requires all pas-

toral counselor members to adhere to its Code of Ethics to safeguard distressed persons seeking their services. The Code defines boundaries, describes duties toward clients, former clients, and supervisees, and proscribes, among other things, sexual harassment or misconduct, dual relationships, and breach of confidentiality. It describes adjudicative procedures when an ethical breach is alleged, including the appointment of a board of review, and the investigatory, review and appellate processes. A finding of an ethics code violation will result in a member's dismissal, suspension, placement on probation with conditions, or reprimand. AAPC also supports public accountability of counselors and encourages members to seek state licensure as professional counselors or marriage and family counselors as appropriate.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO PROTECT FIRST AMENDMENT CLERGY SPEECH AND FREE EXERCISE.

A wolf is hiding in this sheep's clothing. The Colorado Supreme Court baldly states that "clergy malpractice" is not actionable in Colorado, Pet. App. A, 18a, n. 13; *see Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988), but sustains a judgment against an Episcopal bishop who counseled respondent parishioner after she was injured through sexual misconduct with an associate parish priest.[1] This case should be reviewed to correct the error of the lower court, namely, that the First Amendment is not implicated if courts treat clergy counseling in secular terms.[2]

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[1] This brief adopts the facts recited in the Petitioner's statement. *See* Pet., 2-6.

[2] The decision below relied upon expert testimony that described respondent's damage as a loss of "capacity to trust in God and the church" as a result of the sexual relationship with Father Robinson, and said the bishop "*aggravated the breakdown in trust.*"

The court's theory of breach of trust or breach of fiduciary duty, Pet. App. A, 11a, n. 9; 18a, n. 13, improperly provides a legal remedy for respondent's loss of faith and treats the bishop's communication with the respondent parishioner as without constitutional significance.[3] Plainly, Colorado believes it may circumvent the

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(emphasis added) Pet. App. A., at 11a, n.9. The court later said, "Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner." *Id.* at 21a.

The nature and purpose of the trust described by the court, however, is plainly religious. Clearly, if the trust is in God, the church, or in spiritual authority, the state, including the judiciary, may neither supervise the clergy in the exercise of their spiritual authority or vocation, nor provide judicial salvation by recognizing new causes of action to redress the loss of faith. *McClure v. Salvation Army*, 460 F.2d 553, *cert. denied*, 409 U.S. 896 (1972); *see also* Douglas Laycock and Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 Tex. L. Rev. 1455, 1464 (1988) ("As long as membership is voluntary, church members need no protection from their church. They have no constitutional right to demand that the church treat them fairly. Rather, the Constitution protects both the church and individual believers from government interference.").

[3] The bishop and respondent parishioner had one counseling session, with the bishop granting respondent absolution after her confession. The bishop said she seemed to have a "sense of guilt that bordered on the pathological because she blamed herself for the relationship." Pet. App. A, at 10a.

This Court has previously recognized the concern that "a judge would not understand [a religious entity's] religious tenets and sense of mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). When courts supervise clergy communications, they second guess the religious motives and purposes of the parties, and may misunderstand the relevant religious tenets that motivate parishioner to seek counsel and that clergy utilize in giving counsel. Here the court entered an impermissible thicket. by taking expert testimony that questioned, in effect, the efficacy of the religious counsel the bishop provided in response to respondent's request. *See* Pet. App. A, at 10a-11a, and n.9. To illustrate the complexity of questioning religious matters, the court should have steered around (1) the religious counseling given (avoiding

First Amendment, avoid what it admits is not legally cognizable in Colorado (namely, clergy malpractice), and give relief for loss of faith because of the "offense" given by otherwise lawful religious speech. Its "breach of trust" theory as applied to clergy communications may have "different elements," but it is still a wolf in sheep's clothing. *Id.* at 17a. *See Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

Many state courts have reviewed questions involving clergy conduct and not one, until this case, has supported the proposition that because clergy are authority figures, they may be liable to parishioners for their counsel based on secular expert testmony, even if the speech violated no statute regarding defamation or sexual harassment.[4] In fact, when a state court previously refused to apply negligence laws to expand tort liability to embrace so-called "clergy malpractice" and showed deference to federally protected Constitutional rights, this Court properly declined review. *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Unlike *Nally*, Colorado now reaches for the opposite result and in so doing runs aground on the religion

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the necessity to probe the efficacy of the service of forgiveness in the Book of Common Prayer, 447-452, which includes the participation of the penitent *in the asking for counsel and direction*, and in forgiving those who have sinned against them), and (2) the service not rendered, including any consequent harm to respondent had the bishop failed to provide her the service of forgiveness or to regard, as his pastoral concern, the effect of her preoccupation with her injury upon her emotional state or reputation. If respondent had no legally cognizable claim against him for the latter, *a fortiori*, the former cannot give rise to a claim without offending the First Amendment.

[4] See the case law survey of state court decisions resolving clergy malpractice issues in Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 Miss. C. L. Rev. 97, 104-118 (1991).

clauses of the First Amendment. Colorado has effectively ignored this Court's First Amendment jurisprudence which sets important church-state boundaries for courts to follow, prohibiting all government regulation of religious beliefs, *Sherbert v. Verner,* 374 U.S. 398, 402 (1963), and barring courts from taking sides in the exercise of religious authority, *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708-725 (1976); *Presbyterian Church v. Hull Church,* 393 U.S. 440, 445-452 (1969); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 95-119 (1952). These and other cases were cited with approval in *Employment Division v. Smith,* 494 U.S. 872 (1990), because the government's role in those cases implicated religious authority and beliefs. Similar issues are at stake here if the bishop or clergy cannot communicate pastorally with a parishioner without fear of judicial supervision of the content of the communication.

This case should be reviewed because the lower court's decision departs from the consensus of decisional law throughout the country and provides an appropriate opportunity to address new federal legislation, applicable, on a retroactive basis, wherever religious exercise is substantially burdened without a compelling state interest. *See* Religious Freedom Restoration Act, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) ("RFRA").[5] Colorado, without showing a compelling state interest not satisfied by less restrictive means or any specific statutory authority therefor, claims for all clergy counselors a higher, new "fiduciary" standard that will be used in clergy counseling cases, even where there is no mis-

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[5] Congress, by RFRA, and this Court, in *Smith, supra,* would each use the compelling state interest test when both religious belief and speech are substantially burdened by government under the First Amendment. Here, the state actor is the unrestrained judiciary, making decisional law under which both religious belief and speech of clergy will be supervised.

conduct.[6] The results are predictable and will have a "chilling effect" on the free exercise of religion by clergy counselors and supervisors of pastoral counselors. The decision below signals that pastoral counselors will be exposed to legal liability when counseling difficult clients, *e.g.*, persons who suffer from depression or multiple personality disorder, whether or not such persons are concurrently being seen by a psychiatrist. Clergy, currently and properly held to the same standard of ordinary care as other reasonable persons, now worry about such things as adequate intervention with persons having suicidal ideation and when and how to make timely and appropriate referrals in borderline cases. To add to these concerns the potential aggravation of a client's loss of faith (here described as "trust in God and the church," Pet.

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[6] The lower court presumed to tell clergy how to discharge their "fiduciary" (religious) duty, *i.e.*, once they undertake the responsibility to counsel someone, it must be " 'solely for the benefit' of the dependent party, *Destefano*, 763 P.2d at 284." Pet. App. A, 21a. It did not suggest the bishop as counselor was guilty of misconduct, but still applied the standard to him. It failed to note the widespread practice of marital and family counseling, as well as the psychotherapy utilized by pastoral counselors "aimed at specific social, ethnic, or gender groupings." *See* R. Hunter, ed., "Psychotherapy," *Dictionary of Pastoral Care and Counseling* (1990) at 1022, 1026 ("Hunter"); Hunter, "Group Counseling and Psychotherapy," at 478-481. These counseling methods utilize group insights and frequently subordinate the individual counselee to collective insight or interests.

Further, the decision stated "Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner. *See Destefano*, 763 P.2d at 284." Pet. App. A, at 21a. The court's standard may be understood in a religious context, but it is difficult to know what "trust" means as a legal duty without further explanation. *See* Hunter, "Trust in Pastoral Relationship," at 1288 (describing trust in theological perspective, trust and conflict, trust as commitment). Taken literally, the court shoulders the burden of clergy supervision and seems to give a legal remedy whenever clergy has not skillfully responded to a parishioner's "hurts and needs when appropriate." *Id.* at 1288.

App. A, at 11a n.9) is a burden no court should be permitted to place upon clergy. A counselee's loss of faith simply cannot be reached by any tort standard. Without the protection of the First Amendment against the claim of "breach of trust" entertained here by Colorado, clergy will have no recourse but to restrict their counseling and/or supervisory responsibilities to "safer" clients.[7] The public interest that is served by the millions of hours of counseling that occur each year will be irreparably damaged.

II. THE PETITION SHOULD BE GRANTED BECAUSE FIRST AMENDMENT RIGHTS SHOULD OUTWEIGH RISK MANAGEMENT CONCERNS ASSOCIATED WITH SUPERVISION.

The concern that the lower court's decision violated church autonomy protected by the First Amendment by reaching negligence liability through duties arising under legal relationships foreign to Episcopal Church polity and practice will likely be addressed by others and need not be repeated here. But pastoral counseling is a specialized type of pastoral care, usually provided by ordained clergy, available to people willing to seek pastoral help in order to deal with the pain in their lives.[8]

Pastoral counseling is a specialized field with standards and processes for certification of individuals and accreditation of institutions for the practice and teaching of pastoral counseling.[9] Clinical institutions dedicated to pastoral care, accredited by AAPC, are called "counseling centers" and employ pastoral counselors to provide

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[7] The First Amendment was placed in issue by the court below as within its discretion, thereby opening the way for review by this Court. *See* Pet. App. A, 13a.

[8] *See* Hunter, "Pastoral Counseling," at 849; H. Clinebell, *Basic Types of Pastoral Care & Counseling: Resources for the Ministry of Healing & Growth* (1984).

[9] *See* Hunter, "American Association of Pastoral Counselors (AAPC)," at 24.

counseling services to individuals in need, as well as administrative supervision for the counselors. While many centers provide supervised opportunities for training seminarians and clergy as pastoral counselors, clinical supervision, like consultation, may be done by qualified persons not employed by the center.[10] Supervision is thus a multidimensioned phenomenon. In clinical practice, supervision often focuses on issues identified by the counselor. It is clear that pastoral supervision, other than in an administrative context, does not usually correspond to supervision of an employee with its attendant risk management concerns, but is primarily a means of education, often related to psychotherapy, that is intended to further the counselor's insight involving personal resources and practice issues. It can be, but is not necessarily, focused on the client.[11]

The court below shows no awareness of the practice of pastoral supervision and treats this subject woodenly as though counselees are intended third party beneficiaries of their counselor's supervision, when they generally are not. Therein lies the concern of this *amicus*. The danger of the lower court's decision, a truly frightening prospect,

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[10] *See* Hunter, "Pastoral Supervision," 1239-1243 (identifying seven models of pastoral supervision: work evaluation, instructor, apprentice, training, resource, consultative, spiritual guide). Pastoral supervision was developed as a distinct discipline of pastoral care education. Pastoral supervisors are today certified by the Association for Clinical Pastoral Education and give particular attention to the seminarian's psychological development and practice skills. In the counseling center, however, the "student" is likely to be a pastoral counselor in training, an ordained clergy, who is actively counseling clients, but within specific limitations under the oversight of a mentor supervisor. Within the AAPC, the membership level of diplomate indicates the highest level of qualification of pastoral counselor, skilled as a practitioner and as a supervisor-teacher of other pastoral counselors.

[11] *See* J. Bernard and R. Goodyear, *Fundamentals of Clinical Supervision* (1992).

is that pastoral supervisors should be perceived as something they are not, namely, administrative supervisors, instead of as educator-mentors. Educating pastoral counselors does indirectly and beneficially serve the client-counselee, but this should not create legal duties associated with employer-supervisors.

Petitioner has asked that the lower court decision, issued on November 15, 1993, be vacated and that the case be remanded for reconsideration in light of the new federal Religious Freedom Restoration Act, enacted into law on November 16, 1993. This is a reasonable request. However, granting the petition and issuing the writ of certiorari now would serve judicial economy and the public interest. Review will limit the "chilling effect" the Colorado decision will have on clergy supervisors of pastoral counselors and can dispel the uncertainty regarding the relationship of clergy and pastoral counselors, who devote millions of hours annually in counseling distressed persons, to clinical (not administrative) supervisors.

Amicus believes the decision below is clearly erroneous and in conflict with this Court's First Amendment religion clause jurisprudence, the new federal law, and many other state court decisions. It ignores constitutional deference to religious autonomy and regulates religious beliefs, for clergy counselors may no longer exercise their ministry in Colorado without governmental regulation of their exclusive fiduciary duties of loyalty and what they can or cannot say, even if contrary to their beliefs. The instant case can resolve these important questions. Accordingly, this *amicus* urges this Court to grant the petition for a writ of certiorari, at which time *amicus* wishes to present further briefing going to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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